COLUMBIA LAW REVIEW.

VOL. I. MARCH, 1901. No. 3.

THE LAW OF PRIZE AS AFFECTED BY DECISIONS UPON CAPTURES MADE DURING THE LATE WAR BETWEEN SPAIN AND THE UNITED STATES.*

THE Constitution of the United States of America was framed at a time when the influence of Montesquieu was commanding. The theory of the separation of the three Departments of Government, Executive, Legislative and Judicial, is one of the points most insisted upon by the great French jurist. The United States Constitution provides for such a separation. Some of the features of this Constitution have been modified by the stress of unexpected situations that have developed in the history of the Republic. But the theory before mentioned has been closely adhered to. Neither in the central Government of the United States, nor in those of the separate States composing the Federation, is there any such thing as a responsible or parliamentary government. And in all the jurisdictions, whether of the Federal or State Courts, the right and the duty of a court to annul a statute which has passed all the forms of legislation, on the ground that it is in violation of the fundamental law or Constitution of the country is well recognized, and has been from the foundation of the Government. I am far from suggesting that this absolute independence of the judiciary is objectionable. At the same

*A paper read before the Rouen Conference of the International Law Association, 1900.

time it must be admitted that it sometimes puts the Executive in a trying position. It is quite possible, and has indeed sometimes happened, that in the administration of foreign relations the Executive has determined upon a certain line of policy, which the courts in cases coming before them for adjudication have refused to enforce. This has been notably true in questions arising in reference to the rights of neutrals and the law of prize and of blockade. The policy of the Executive in dealing with these questions has been far more liberal than one would suppose from reading the decisions of the courts of justice. This is in large measure to be attributed to the fact that the law of the United States has for its foundation the law of England, and that the decisions of the English courts have always been cited with great respect in the tribunals of America. Indeed the jurisprudence of the United States is based upon English authorities to a much greater extent than any one would suppose possible, who had not been a careful student of American law.

During the struggle between Napoleon and the older Governments of Europe, including that of Great Britain, the extent of the rights of neutrals became the subject of frequent discussion in prize courts. The necessities of the conflict compelled both sides to take ground in reference to foreign trade, which nothing but necessity could justify, or excuse. The policy of the British Government on this subject as it existed at the time found expression, not only in the celebrated Orders in Council, but in the judgments of the British prize courts. The Kingdom of Great Britain was fortunate in having for many years as the Judge of the Court of Admiralty Sir William Scott, afterwards Lord Stowell. He was a man of extensive learning, of extraordinary vigor and acuteness of intellect, and the luminous style of his judgments makes them models of judicial expression. These judgments were read in America, and became the foundation of the law of prize as administered in the courts of the United States. These courts during the Civil War between the Northern and Southern States of the Union realized the necessity of enforcing the law of blockade with the utmost strictness. The decisions of Lord Stowell were adopted as precedents.

During the late war between the United States and Spain, counsel who were entrusted with the conduct of prize cases before the Supreme Court of the United States found themselves confronted with a body of decisions which on the whole were far more favorable to the exercise of belligerent rights than to the protection of the rights of neutrals. The policy of the Executive was more liberal. This was shown at the outset of the war by the declared adhesion to the declaration of Paris. The reason given by the American Government in 1856 for its refusal at that time to adhere to the Declaration of Paris, was the fact that this failed to prohibit the capture of private property at sea. At the outset of the Spanish War, the Government of Spain also declared its adhesion to the Declaration of Paris, and although it reserved the right to commission privateers, yet it did not exercise this right. It may fairly be said that the Declaration of Paris has by universal consent become a part of the law of nations.

The action of the President in regard to the Declaration of Paris is thus stated in his Annual Message to Congress, transmitted December, 1898 (page 7):

"In further fulfillment of international duty I issued April 26, 1898, a proclamation announcing the treatment proposed to be accorded to vessels and their cargoes as to blockade, contraband, the exercise of the right of search, and the immunity of neutral flags and neutral goods under enemy's flag. A similar proclamation was made by the Spanish Government. In the conduct of hostilities the rules of the Declaration of Paris, including abstention from resort to privateering, have accordingly been observed by both belligerents, although neither was a party to that declaration."

It is the opinion of two writers on International Law, of the highest rank, Pistoye and Duverdy (des Prises, Vol. 1, page 375), that by the modern law, in consequence of the Declaration of Paris, a vessel must be notified to depart from before the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council, during the Napoleonic wars, which is now given up by that country.

"The old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is

now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."*

In the opening words of the President's proclamation of April 26th, 1898, reciting the fact of war with Spain, it was declared to be " Desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice " (30 Stat., p. 1770).

This effect of the Declaration of Paris is only an affirmation of the original American rule, which the stress of the war with Napoleon led Lord Stowell to reject. The stress of the war with the South induced our Courts, at that time, to follow to some extent the English rule. Our Government had not then declared its adhesion to the Declaration of Paris. But the old American rule, as laid down by the Executive, was in accordance with this statement of Pistoye and Duverdy.

Wheaton on Captures (pp. 342, 343) quotes a letter from the British Admiralty office January 5, 1804 (by authority Secretary State Foreign Affairs, p. 342). In this it is stated that the British Government " sent orders to Commodore Hood not to consider any blockade of these islands as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them."

This was approved by the Government of the United States (*Ibid.*, 353, Dispatch Mr. Pinkney to Marquis Wellesley).

* " On considerait comme une violation de blocus le fait de se diriger vers des lieux qui étaient bloqués. Aujourd'hui il n'en saurait être même, car des neutres ne sont obligés de respecter que les blocus effectifs ; or, il peut se faire q'un blocus notifié officiellement ne soit pas effectif, il peut même se faire qu'un blocus, qué a été établi avec des forces suffisantes ait cessé d'exister ; les neutres sont dans leur droit de se diriger vers un port bloqué pour voir si le blocus subsiste toujours ; ils ne sont coupables que lorsque, le blocus existant, ils cherchent à le violer."

In this dispatch our Minister to the Court of St. James adds (page 353):

"No comment can add to the value of that manly and perspicuous exposition of the law of blockade, and made by England herself, in maintenance of rules which have been respected and upheld in all seasons and on all occasions by the Government of the United States."

And in another dispatch the American Minister maintains (pages 354, 355):

"That a vessel cleared or bound to a blockaded port shall not be considered as violating in any manner the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it."

Some of the reasons for the historic policy of the United States are thus stated by Wharton (Digest of International Law, Vol. 3, Sect. 405, page 659):

"The policy of the United States is to maintain neutral immunities for the following reasons: (1) The probabilities of war are far less with us than with the great European States. From the nature of things, points of friction between the United States and foreign nations are comparatively few. We have an ocean between us and the great armed camps of the Old World; and while there are innumerable questions as to which one European State may come into collision with another, the only points as to which we would be likely to come into collision with a European State are those concerned in the maintenance of neutral rights. It was to maintain such rights that we went to war in 1812; and except, during the abnormal and exceptional spasm of the late Civil War, our national life has heretofore been the life of a neutral and vindicator of neutral rights; and neutrality when our system took shape was arduous. The world was absorbed in the tremendous contest between France on the one side and England with her allies on the other. At times we were the only civilized power that remained neutral. Threats and blandishments were used, both by France and England, to drive us from our position, but that positon was not only defined and defended, under General Washington's administration in papers so able and just as to be the basis of all future proclamations of neutrality, but was adhered to, though necessitating a war for its defense. Our international attitude is, from the nature of things, that of neutrality; and of the rights of neutrals we are from the necessity of the case the peculiar champions. (2) Although the richest country in the world, our traditions and temper are adverse to large naval and military establishments. (3)

The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the Civil War; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small; it would be hard to convince the people of the United States that the immense and exhausting armaments of the great European States are not in part caused by the assigning of undue power to belligerents, and that one of the best ways of inducing a gradual lessening of these armaments would be the reduction of these powers."

In the preface to the same work (2d Ed., Vol. 1) Wharton does no more than justice to the traditional policy of the United States upon the subject.

"In Mr. Fillmore's second annual message, in a passage understood to have been furnished by Mr. Webster, then Secretary of State, we were told that 'one of the most eminent of British statesmen said in Parliament, while a minister of the Crown, "that if he wished for a guide in a system of neutrality he should take that laid down by America in the days of Washington and the secretaryship of Jefferson"'; and we see, in fact, that the act of Congress of 1818 was followed the succeeding year by an act of the Parliament of England substantially the same in its general provisions."

"The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

We have now to compare with these statements as to the policy adopted by the Executive of the United States, the decisions of the United States Supreme Court made during the late war.

Sufficiency of Blockade.—In the case of the *Olinde Rodriguez*[1] a question arose as to the sufficiency of the blockade at the port of San Juan. The steamer *Olinde Rodriguez* was captured by the cruiser *Yosemite*. She was a French

[1] Volume 174, United States Reports, page 510.

mail steamer, and the port of San Juan was one of her regular ports of call. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. After this proclamation the steamer entered the port, came out of it, was signalled by the *Yosemite*, and had an official warning of the blockade of that port entered in her log. On a subsequent voyage she was captured by the cruiser *New Orleans*, on the ground that she was then attempting to run the blockade. The judge of the court of first instance held that the blockade of San Juan was not an effective blockade, and relied upon earlier cases, in which it was held that the presence of one blockading vessel off a port was not sufficient to make the blockade effective. On this point he was overruled by the Supreme Court of the United States.

Mr. Chief Justice Fuller, delivering the opinion of the Court, says:[1]

"The fourth maxim of the Declaration of Paris (April 16, 1856) was: 'Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' Manifestly, this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockade where extensive coasts were put under blockade by proclamation, without the presence of any force, or an adequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances."

"This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus:

"'The Declaration of Paris was, in truth, directed against what were once termed 'paper blockades,' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man of-war in the offing or the like. The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St.

[1] Vol. 174, United States Reports, 513.

James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that declaration. Hall's Int. Law, Sect. 260, p. 730, note.'

"The quotations from the Parliamentary debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined. "Force sufficient to prevent the ports being approached without exposure to a certain danger.'

"Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous.

"Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent."

The Court held that the question of effectiveness was not to be controlled by the number of blockading ships. The opinion refers to the treaty between France and Denmark in 1742, to the treaty of 1760 between Holland and the two Sicilies, and to the treaty between Prussia and Denmark of 1818. In all these treaties it was stipulated that the presence of more than one belligerent vessel should be essential to the validity of a blockade. But the Court holds that such particular agreements between nations are not of special importance in fixing general international law, and concludes:

"That if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective."

The *Yosemite*, the steamer which first maintained that blockade was an American merchant ship converted into an auxiliary cruiser. Her maximum speed was 15½ knots. She mounted eighteen guns, the largest of which was 5-inch, their greatest range 3½ miles. The *New Orleans* was

an armored cruiser, whose maximum speed was 22 knots. She mounted twenty-four guns, the largest of which were 6-inch, and their maximum range was $5\frac{1}{2}$ nautical miles. Moving at maximum speed, she could cover in ten minutes any point in a circle 19 miles in diameter, and her electric searchlight could sweep the sea at night for 10 miles distant. Obviously, a blockade by such a vessel was sufficient where the entrance to the blockaded port was by one channel only. On the other hand, it is quite easy to see that a port might have several channels separated by a distance of 10 or more miles, and that in such a case a blockade by one cruiser only would not be sufficient.

Intent to Run a Blockade.—In the same case, the Court held that there was no sufficient proof that the steamer in question intended to run the blockade. It was shown that her consignee had requested the captain to stop at San Juan and take fifty first-class passengers. This was a temptation to enter there. But the Court held that the uncontradicted evidence from the ship's officers, to the effect that there was no intention to run the blockade of the port, was controlling. In dealing with this question of evidence the Court says (page 535):

"The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned."

On the other hand, the Court held that the movements of the steamer were sufficiently suspicious to warrant a belief on the part of the captors that she was endeavoring to draw them within range of the shore batteries, under cover of which she could safely enter, and on this ground awarded restitution of the prize without damages, and imposed upon the owner payment of "the costs and expenses incident to her custody and preservation."

In the case of the *Newfoundland* [1], the Court also had to deal with the question of actual intent to run the blockade. The vessel in that case was captured near the port of Havana. There also the allegation of the captors was that the vessel was loitering near a blockaded port, and manœuvering to get under the protection of the shore batteries.

[1] 176 United States Reports, 97.

There were the additional circumstances of suspicion that the vessel had been warned off one port in the Island of Cuba, and was sailing westward, ostensibly with the view of passing around the western end of the Island, whereas her nearest route to her port of destination would have been to the eastward, passing around the eastern end of the Island. This, however, was held not to be controlling.

In short, in dealing with evidence of actual intent to run a blockade, the Supreme Court of the United States has shown liberality towards neutrals, and has exacted from the captors very decisive proof of intent to violate the blockade.

On the other hand, in the case of the *Adula*[1], the Court followed the most strict of the decisions during the Napoleonic wars and the Civil War of the United States. There was no serious question in this case as to the intent of the *Adula*. She was a British ship, chartered by a Cuban to go from Kingston, in the Island of Jamaica, to Guantanamo and Santiago, in the Island of Cuba. She went in ballast, with no cargo, and for the purpose of taking off refugees. She had been engaged in this business on several prior voyages, with the consent of the United States Government. The Court held in the first place, that to constitute a valid blockade it was not necessary that any official notice of the blockade should have been given. Neither Guantanamo nor Santiago were included in the proclamation of the President, declaring what ports in the Island of Cuba should be considered as blockaded. But the Court held that it was competent for the commander of the squadron off these ports to maintain a blockade there, and that notice of a blockade *de facto* was sufficient to charge a ship sailing for such a port with the intent to violate it. It appeared that the *Adula*, which was a slow vessel, having a a speed of only eight knots, was instructed to request permission to enter these ports, and the speed of the vessels maintaining the blockade was such that any attempt on her part to run the blockade would have been futile. No attempt was made. Permission was in fact requested, and indeed the *Adula* was at anchor when she was seized.

[1] 176 United States Reports, 361.

Nevertheless, the Court adhered to the letter of earlier decisions, that the mere fact of sailing for a port known to be blockaded subjects the vessel so sailing to condemnation, and that it is unlawful even to ask permission to enter. It was further held that the case was not altered by the fact that the port of Guantanamo, at the time of the capture, was and had been for over two weeks in the exclusive pos session of the United States naval and military authorities.- The city of Guantanamo was inland, on a small stream, not navigable, and distant several miles from the bay. In this latter case, four Justices of the Supreme Court dissented, and the decision was made, therefore, by a majority of but one Judge. It is also to be observed that on the point last mentioned the decision was at variance with that of the commission created by the treaty of Washington (1871) to dispose of the matters in difference between the United States and Great Britain, growing out of the Civil War in the United States (1861–1865).

That commission, which was an international court, were of the opinion that the law was otherwise. The Commission was composed of one Commissioner appointed by Great Britain, one appointed by the United States, and an Italian Commissioner (Count Corti) agreed upon by both parties. A claim was presented to it by a British subject for cargo seized upon the *Circassian*,[1] which had sailed for the port of New Orleans before that port was captured by the Federal troops. During the voyage the capture took place. A majority of the Supreme Court had held that inasmuch as the country in the vicinity of New Orleans, forming part of the port, was still in the possession of the Confederates, the blockade could not be considered as having been raised. To use the language of the Court (2 Wallace Reports, 141):

"The rebel Mayor and Council were deposed. There was no armed resistance, but the city was bitterly disaffected, and was kept in order only by severe military discipline, and the rebel army was still organized in the vicinity."

[1] The report of the agent of the United States, Robert S. Hale, upon this case, is contained in Volume 6 of Papers Relating to Treaty of Washington, pages 141 to 148.

A majority of the Commission were of the opinion that the decision of the majority of the Supreme Court in this case was erroneous, and awarded damages to the owner of the *Circassian* for the capture. It is plain, from the dissenting opinion of Commissioner Frazer, that his dissent was based upon the proposition that the port of New Orleans was not in possession of the United States at the time the *Circassian* was captured, although the city was. He substantially admits that the *Circassian* would not have been subject to capture if the whole port had been in possession of the United States. This was a much stronger case for the captors than that of the *Adula*. There was no question that it was the intent of the *Circassian* when she sailed to run the blockade, if she could; whereas it was equally clear that it was never the intention of the *Adula* to run the blockade.

This case is a notable illustration of what has been already stated, that the United States Supreme Court has often felt itself constrained by previous decisions to decide cases of a public character pending before them in a manner at variance with the declared policy of the Executive.

The special message of the President sent to Congress April 11, 1898, expresses the intention of the United States Government in undertaking to intervene in Cuba.

Page 11: "The grounds for such intervention may be briefly summarized as follows:

"*First.*—In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate, it is no answer to say that this is all in another country, belonging to another nation, and is therefore none of our business. It is especially our duty, for it is right at our door."

On the day on which this message was sent to the Congress, the President received by previous arrangement a visit from the Ambassadors of Great Britain, France, Germany and Italy, the Russian Chargé d'Affaires, and the Austrian Minister. Sir Julian Pauncefote, the British Ambassador, as dean of the diplomatic corps, presented a note signed by the six visitors in their respective capacities, appealing "to the feelings of humanity and moderation of the

President and of the American people in their existing differences with Spain," and expressing "a hope that further negotiations will lead to an agreement which, while securing the maintenance of peace, will afford all necessary guarantees of the re-establishment of order in Cuba."

The President's response echoed the hope of a peace secured by "necessary guarantees for the re-establishment of order in the Island, so terminating the chronic condition of disturbance there, which so deeply injures the interest and menaces the tranquillity of the American nation by the character and consequences of the struggle thus kept up at our door, besides shocking its sentiment of humanity."

In view of the statements made thus explicitly to the Ambassadors of the neutral powers, contemporaneously with the message to the Congress, and published to the world as the declared intention and purpose of the United States, it is not surprising that a neutral residing in Jamaica should have felt justified in sending a vessel to a port in Cuba in the possession of the United States, respecting which no official blockade had been declared, for the purpose of asking permission to take away refugees. This belief on the part of the neutral was fortified by the fact that the United States Government itself had previously chartered from this neutral owner the very ship that was afterwards seized, to go to a blockaded port, Cienfuegos, and bring away refugees.

It was of more importance to the United States to have her undertake this last voyage than any previous one. If the earlier refugees which the *Adula* took away had not been removed, they would not have been a burden upon the resources of the United States. But the refugees whom the *Adula* went for at the end of June did become a burden of a most serious character. It would have been a distinct advantage to the United States in their military operations, if the *Adula* had been allowed to go to the entrance of Santiago Harbor, and take away as many noncombatants and neutrals from that city as she could carry. But a majority of the Court held that relief in the premises must be had from the Executive and not from the Court.

In view of this decision, it is interesting to refer to a

declaration of the President of the United States made just after the treaty of peace.

In his message to the Congress in December, 1898, the following statement is made of the lesson taught from the experience of the war. Page 37:

"The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceable trade and commerce. It is true we may suffer less in such cases than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension, into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers, with a view to incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers."

The purpose thus declared is in pursuance of the historic policy of the United States. Under date of August 1, 1823, Mr. Adams, then Secretary of State, wrote to Mr. Middleton, United States Minister to Russia:

"The principle upon which the Government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea. If there be any objection to this conclusion, I know not in what it consists; and if any should occur to the Russian Government, we only wish that it may be made the subject of amicable discussion."[1]

[1] Adams to Middleton; Wharton's Int. Law Dig., Sect. 342, Vol. 3, p. 261.

Mr. Seward, the Secretary of State, in addressing the United States Ministers in European countries, April 24, 1861, wrote:

"For your own information it will be sufficient to say that the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals not contraband should be exempt from seizure and confiscation by national vessels in maritime war."[1]

Position of Cubans During the War.—An interesting question in this connection arose in the case of *The Benito Estenger.*[2] It was maintained by the counsel for the ship that the declared policy of the United States, which has previously been stated, in reference to the inhabitants of the Island of Cuba, put them in the position of friends, and that a vessel belonging to a person who had been a Spanish subject, but who was a Cuban and friendly to the Insurgents, could not lawfully be captured. The majority of the Court, however, held otherwise, and adhered to the old rule "that in war the citizens or subjects of the belligerents are enemies to each other, without regard to individual sentiments or disposition, and that political status determines the question of enemy ownership."

In this case, also, the Court adhered to the rigor of the old decisions in reference to a transfer of the legal title to a ship to a neutral owner during a war. The Cuban owner, pending the war, had executed a bill of sale of the ship to a British subject. The burden of showing the *bona fides* of a sale under such circumstances was held to be upon the claimant, and very positive evidence was exacted in support of the *bona fides* of the sale.

It must be admitted in this case that the fact that the former owner was on board the ship at the time of the capture, and was evidently interested in her movements, though not positively directing them, was very suspicious.

Fishing Boats.—In another of the prize cases[3] the Supreme Court (also by a divided vote) showed a greater dis-

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[1] Wharton's Int. Law Dig., Sect. 342, Vol. 3, p. 275.

[2] 176 United States Reports, page 568.

[3] The *Paquete Habana*, 175 United States Reports, 354.

position than in the case of the *Adula*, to recognize the growth and development of international law. In that case, and in others which were involved in it, blockading vessels of the United States had captured numerous small fishing boats which were engaged in catching fish off the shore of the Island of Cuba for domestic consumption. The case was argued with great learning and ability by the counsel for the fishermen, and he succeeded in convincing the Court that by international law, by the general consent of civilized nations, and independently of express treaty, fishing vessels honestly pursuing the calling of catching and bringing in fresh fish were exempt from capture.

The Court recognized that such a calling might often be made a pretext for obtaining information as to the coast and the fleet of an enemy. Several cases were cited, in which the fishery was held to have been such a pretext in the British Channel during the Napoleonic wars. The decision does not impair the right of one belligerent to seize fishing boats shown to be actually engaged in obtaining information for the other belligerent.

Mail Steamers.—In the case of the *Panama* [1], it was argued by counsel for the owners that under the modern law of civilized nations, mail steamers were exempt from capture. And further, that under the circumstances of that case the United States must be considered as having consented to the voyage, and thereby impliedly waived the right to seize the vessel.

The *Panama* was a Spanish mail steamer engaged in transporting passengers, mails and freight between New York and Havana. She was cleared by the United States authorities from the New York Custom House, and sailed from New York for Havana on the 20th of April, 1898, with United States mails on board. An Act of Congress declared war to have existed from the twenty-first of April. The Court held that such clearance and carriage of mails were subject to the right of the Government, in case of a declaration of war, to seize the vessel before she reached her destination.

President's Proclamation.—At the beginning of the war

[1] 176 United States Reports, page 535.

the President of the United States, following the practice which had previously been adopted by many civilized nations, issued a proclamation in reference to vessels engaged in commerce, and belonging to the subjects of the other belligerent. The fourth and fifth clauses of this proclamation are as follows:

"*Fourth.*—Spanish merchant vessels, in any ports or places within the United States, shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy; or any coal (except such as may be necessary for their voyage), or any other article prohibited, or contraband of war, or any dispatch of or to the Spanish government.

"*Fifth.*—Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

In the case lastly referred to, it appeared that the *Panama*, pursuant to contract with the Spanish Government for carrying the mails, was armed with five cannon, some rifles and ammunition. The cannon had been on board over three years, the rifles and ammunition over two. She was constructed with a view to possible use in war. The Court held that these circumstances brought her within the language of the proviso contained in the fourth clause of the proclamation. This decision is of general importance. The principal maritime nations of the world have contracts with the owners of steamships, similar to those which the Spanish government had with the company to which the *Panama* belonged. If this decision should be adopted by other nations, it will take all such vessels out of the protection given by proclamation to vessels sailing from or bound for the ports of one belligerent

at the time of the outbreak of hostilities. It is obvious that if any other construction were to be adopted, vessels of the character referred to could enter their home port and might become of essential assistance to the belligerent owning such port. In point of fact, during the Spanish war, two vessels belonging to the American Line were taken by the United States Government, converted into auxiliary cruisers, and rendered important services during the progress of hostilities.

In another case arising under the same proclamation, that of the *Buena Ventura*[1], it was held that the proclamation, although not issued at the very beginning of the war, was retroactive, and exempted from capture vessels which were within its terms at the beginning of the war, although they were captured before the proclamation was issued. In this case the seizure was made April 22, 1898, and the proclamation was not issued until April 26, 1898. The ultimate destination of the steamer was Rotterdam, but her immediate destination was Norfolk, Virginia, in the United States, to take in coal.

On the other hand, in *The Pedro*[2] and *The Guido*[3] the Court held that the fact that the ultimate destination of the captured vessel was a port in the United States would not exempt her from capture, provided her immediate destination was an enemy's port.

In the case of *The Pedro*, the steamer sailed from Havana for Santiago, on the 22d of April. Her ultimate destination was Pensacola. But it was held by a majority of the Court that the doctrine of a continuous voyage did not apply to this case, and that while it was true that *The Pedro* would have been exempt had she sailed from Havana direct for Pensacola, yet the fact of her sailing for Santiago put her without the pale of the proclamation, and subjected her to capture as enemy's property. In this case four of the Justices dissented.

In *The Guido*, the proof was less clear of ultimate intention to go to a port within the United States. The same

[1] 175 United States Reports, 384.
[2] 175 United States Reports, 354.
[3] 175 United States Reports, 382.

rule was applied as in that of *The Pedro.* Three of the Justices dissented.

Liens for Advances by Neutrals on Enemy's Cargo.—In *The Carlos F. Roses*[1] a Spanish barque was captured at sea on her course to Havana. The cargo was consigned to Spanish subjects in Havana, by citizens of a neutral State. The Court held that, on the evidence, when the goods were delivered to the vessel, they became the property of the consignees. Indeed no claim to the proceeds of the cargo was interposed by the consignors. A claim was interposed by bankers in England, who had made advances upon the cargo, and had received as security therefor the bills of lading duly endorsed in blank. The consignors drew drafts upon the British bankers for the amount of the advances, which drafts were paid by them. The Court held that there was not sufficient evidence that it was the intention of the consignors to vest the title to the cargo in the drawees of the bills. No evidence was introduced as to the real nature of the transaction, and the bills of lading were not produced by the drawees. It was evidently the opinion of the Court that the bankers probably had some other indemnity, and it was held that the mere fact that bills of lading endorsed in blank were forwarded to the bankers, accompanying the bills of exchange drawn upon them, did not operate to vest the title in the drawees. Two Justices of the Court dissented upon this latter point, and held that the documentary evidence, in the absence of contradiction, established that the title to the cargo vested in the neutral, and that therefore it was not lawful prize, so far at any rate as his interest to the extent of his advances was concerned. The earlier decisions were approved, to the effect that liens of bottomry bonds, of mortgages, and for supplies, are not protected in the prize courts, and "that the right of capture acts upon the proprietory interest of the thing captured at the time of the capture, and is not affected by the secret liens of private engagements of the parties." The language of Lord Stowell in *The Marianna*[2] is quoted with approval.

"Even if bills of lading are delivered, that circumstance

[1] 177 United States Reports, 655.
[2] 6 C. Robinson Reports, 24.

will not be sufficient unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage and as to the market to which they are consigned."

Summary.—To sum up the result of these decisions, we may say that the rule of the American courts upon the subjects covered by them is as follows:

I. In the case of a neutral captured near a blockaded port, proof of actual intent to run the blockade must be clear and decisive.

II. A blockade may be effective, though carried on by one armed cruiser only.

III. A blockade *de facto* may be established by a naval commander without express authority from the Executive. Knowledge of such a blockade is equivalent to formal notice of a blockade *de jure*. Sailing from a neutral port bound for a port where such a blockade *de facto* is maintained subjects the neutral vessel to forfeiture, though there be no actual intent to run the blockade.

IV. Where one nation intervenes in domestic insurrection and takes sides with the insurgents, merchantmen belonging to the insurgents will nevertheless be considered as enemy's property.

V. Fishing boats engaged solely in domestic fishery are exempt from seizure as prize of war.

VI. Mail steamers, as such, are not exempt from seizure as prize of war.

VII. Proclamations allowing vessels belonging to one belligerent to sail either from or for the ports of the other belligerent, will be liberally construed, and, if issued after the commencement of hostilities, will be considered to relate back to the beginning of the war. But they will not extend to vessels which are adapted for use in warfare under contract with the belligerent government, although in point of fact they never have been so used.

VIII. When cargo consigned to an enemy is captured on an enemy's vessel, title in a neutral claimant will not be sufficiently established by proof that he has made advances for the purchase of the cargo, and has paid drafts drawn on him for the amount of the advances, which drafts were accompanied by bills of lading endorsed in blank.

It is hoped that this statement of the decisions of the United States Supreme Court during the war with Spain, now fortunately terminated, will be of interest, not only as throwing light upon the law of prize, but as illustrating the gradual evolution and development of international law. To a greater extent than any other body of law, international law is the result of usage. No Parliament of the world has yet assembled. The nearest approach to this is to be found in the conferences that meet from time to time, and which have recommended for adoption by the nations composing them, certain modifications of the customary law as it had been previously understood to exist. The law of nations, however, is composed to a much greater extent of the results of usage than it is of the Conventions of International Conferences. It follows of necessity from the very nature of usage that it is subject to modification as the conditions which gave rise to it themselves are changed.

A remarkable illustration of this is to be found in the case of cartel ships. During the wars with Napoleon, it was held by the English courts that such ships were exempt from capture, although they belonged to one of the belligerents: In the *Daifjie*, [1] Lord Stowell says:

"The question is, whether from the circumstances under which they were taken, they (cartel ships) are to be considered under the protection of that character or not. It is a practice of no very ancient introduction among the states of Europe, to exchange prisoners of war in this manner; it has succeeded to the older practice of ransoming, which succeeded to the still more ancient practice of killing, or carrying them into captivity. I say it is a practice of no remote antiquity, because, on looking into Grotius, I find not a word of exchange, in the sense in which we are now speaking of it. It is a practice, therefore, which, at least as far as his writings seem to indicate, was not of very familiar and general use in his time, though perhaps not altogether unknown. It is, however, of a nature highly deserving of every favorable consideration, upon the same principles as are all other *commercia belli*, by which the violence of war may be allayed, as far as is consistent with its purposes, and by which, something of a pacific inter-

[1] 3 C. Robinson, 139, 140.

course may be kept up, which, in time, may lead to an adjustment of differences, and end ultimately in peace."

A clear statement of other changes in the law of prize which have gradually developed as nations have become more civilized, and the usages of war more humane, is given by the Supreme Court in its judgment in the case of the *Paquete Habana*[1].

"By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the Government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com., 91, note; Halleck, Chap. 20, Sec. 22; Calvo, Sec. 2376; Hall, Sec. 138.

"In 1813, while the United States were at war with England, an American vessel on her voyage from Italy to the United States was captured by an English ship, and brought into Halifax, in Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice-Admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia was granted by Dr. Croke, the Judge of that Court, who said: 'The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered, not as the peculium of this or of that nation; but as the property of mankind at large, and as belonging to the common interests of the whole species.' And he added that there had been 'innumerable cases of the mutual exercise of this courtesy between nations in former wars.' The Marquis de Somerueles, Stewart Adm. (Nova Scotia), 445, 482.

"In 1861, during the war of the Rebellion, a similar decision was made in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal and restored to the agent of the university, said: 'Though this claimant, as the resident of a hostile district, would not

[1] 175 United States Reports, 677.

be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory.' He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books." *The Amelia*, 4 Phila., 417.

These changes in the usages of nations naturally first became known to the Executive Department of Governments. In the nature of the case the Executive is more flexible in its action than the Judiciary. The respect which is paid to precedent may differ in different nations. But the tendency in every nation is that an organization of a permanent character will adhere to its traditions. In civilized countries no organization is more permanent than courts of justice. In none is the disposition to adhere to tradition or precedent stronger. The danger is that Courts will adhere too closely to traditions, and that the law will thus tend to crystallize and become rigid. A wise system of law, however, should be flexible, and grow with the growth of nations. To use the language of Prof. Lawrence, of the University of Cambridge ("Principles of International Law"; preface):

"International law may be regarded as a living organism which grows with the growth of experience, and is shaped in the last resort by the ideas and aspirations current among civilized mankind."

The same is true of other branches of the law. In reference to equity jurisprudence as administered in the Court of Chancery, Lord Chancellor Cottenham says[1]:

"I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice and to enforce rights for which there is no

[1] Walworth *v.* Holt, 4 Mylne & Craig, 619, 635.

other remedy. This has always been the principle of this Court, though not all times sufficiently attended to."

Chief Justice Gibson, an eminent American jurist, delivering the judgment of the Supreme Court of Pennsylvania, uses the following language[1]:

"It is one of the noblest properties of this common law, that instead of moulding the habits, the manners and transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvements of the age."

It is a misfortune to any nation when this growth ceases. Fortunate, indeed, is that country whose courts are so enlightened as to hold the happy mean between that fickle temper which is destructive of stable institutions, and that ultra-conservatism which deprives a nation of the unspeakable benefit of a system of law adapted to its needs and growing with its growth.

EVERETT P. WHEELER.

[1] Lyle *v.* Richards, 9 Sergt. & Rawle (Penn.), 322. See also Holden *v.* Hardy, 169 United States Reports, 366, 385, 388.